

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM CASE NO. E321 OF 2019

BETWEEN

**SEO AND SONS
LIMITED.....PLAIN
TIFF**

AND

**KENYA AIRPORTS
AUTHORITY.....DEFENDANT**

JUDGMENT

Introduction and Background

1. By its Amended Plaint dated 26th July 2024, the Plaintiff avers that it is a Civil Works Contractor and that sometime in February 2016, it bid for the construction of *Mandera Wargadud Airport Phase 1* following an advertisement by the Defendant. The Defendant rejected the Plaintiff's bid in April 2016 for failing to meet mandatory requirements and the Plaintiff successfully challenged the rejection at the Public Procurement Review and Appeals Board

(PPRAB), which set aside the decision and directed re-evaluation. Aggrieved by this decision, the then successful bidder filed a Judicial Review application which was dismissed and the Plaintiff was eventually declared the successful bidder after re-evaluation.

2. The Plaintiff claims that it was asked to begin work immediately for a project commissioning by the President in May 2016 and that a formal contract was signed on 27th June 2016. The Plaintiff states that it carried out significant works, including surveys and bush clearing. In July 2016, the Defendant terminated the award, citing misrepresentation by the Plaintiff and it challenged this termination by way of Judicial Review and in March 2018, the Court quashed the termination. The Plaintiff claims that despite this, the Defendant again terminated the contract in July 2018, leading to the present suit where it prays for Kshs. 75,690,000.00 being the value of works already done by the Plaintiff, Kshs. 53,404,330.71 being loss of profit, interest and costs of the suit.
3. In its defence dated 22nd October 2020, the Defendant denies or puts the Plaintiff to strict proof on the allegations, including the

nature and value of works allegedly performed, any agreement on the quantum of works or the claimed sum of Kshs. 75,690,000.00 and the existence of any agreement on the value of works after the contract cancellation. The Defendant states that the contract was terminated because the Plaintiff submitted fraudulent documents regarding its qualifications in the tender process and this, according to the Defendant, constituted an offence under **sections 66(2), (3) and 83** of the ***Public Procurement and Asset Disposal Act(Chapter 412C of the Laws of Kenya)***. The Defendant denies any agreement on the value of works done and it argues that if any amount is payable, it can only be determined through evaluation by a competent team of experts on the works performed, if any. For these reasons the Defendant prays that the Plaintiff's suit be dismissed with costs.

4. When the matter was set down for hearing, the Plaintiff presented three witnesses. It called its director, Samow Edin Osman (PW 1) who relied on his witness statement dated 26th September 2019 and produced the Plaintiff's List and Bundle of Documents of the same date (PExhibit 1-19). It also called QS Haron G. Nyakundi, a Quantity Surveyor who relied on his witness statement dated 24th

September 2024 and produced his Expert Report of the same date (PExhibit 20). The Plaintiff then called, Julius Njoroge Ndung'u, a Surveyor who relied on his witness statement dated 28th February 2024 and relied on his Topography Survey Report dated 28th October 2016(PExhibit 21) and Topographical Drawings dated June 2016(PExhibit 22).

5. On its part the Defendant called one witness; Judy Chepkor, its Procurement Officer (DW 1) who relied on her witness statement dated 2nd July 2021 and produced the List and Bundle of Documents of the same date (DExhibit 1-14). In addition to their pleadings and evidence, the parties have also filed written submissions in support of their respective positions and I will make relevant references to the same in my analysis and determination below.

Analysis and Determination

6. In making this determination, I am guided by the fact that the standard of proof in civil cases is on a balance of probability and that the burden of proof is on the party alleging the existence of a fact which he wants the Court to believe. This is anchored in

section 107 (1) and (2) of the **Evidence Act(Chapter 80 of the Laws of Kenya)** which provides that “*whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist*” and that “*When a person is bound to prove the existence of any fact it is said that he burden of proof lies on that person*”. In **Miller .V. Minister Of Pensions 1947 ALL E.R 372**, Lord Denning aptly summarised the application of the standard in the following terms:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal can say: We think it more probable than not; the burden is discharged, but, if the probabilities are equal, it is not.

Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case is which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un) convincing, the party bearing

the burden of proof will lose because the requisite standard will not have been attained.”

7. The Court of Appeal in **James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 (KLR)** simply put it that *‘Courts will make a finding based on which party’s version of the story is more believable.’* From the parties’ submissions, I find that the court is being called upon to resolve the following issues:

- i. Whether the Plaintiff can legally seek to enforce an invalid contract*
- ii. Whether the Plaintiff duly undertook a detailed topographic survey of the runway strip and neighborhood area of approximately 150 square kilometers; setting out location coordinates of key points and established temporary beacons, and whether it is entitled to be paid the sum of Kshs. 15,200,000.00*
- iii. Whether the Plaintiff had mobilized to the site by setting up camp and providing a temporary Engineer’s prefabricated offices as per the provided drawings including connection to services as directed by Engineer, camp to be removed at the end of contract, which it consequently demobilized upon termination and whether it is entitled to be paid the sum of Kshs. 7,000,000.00 in respect thereof*

- iv. *Whether the Plaintiff had undertaken 48.8 Hectares of bush clearance and top soil stripping and whether it is entitled to be paid the sum of Kshs. 53,666,000.00 at a rate of Kshs. 1,100,000.00 per hectare, in respect thereof*
- v. *Whether the subject termination was unlawful, as a consequence of which the Plaintiff is entitled to the sum of Kshs. 53,404,330.71 or any sum at all for loss of profit*
- vi. *Whether the Plaintiff is entitled to the reliefs sought in view of the Defendant's allegation of fraud*
- vii. *Whether interest should accrue to any of the awarded sums for works performed*
- viii. *Who is to bear the costs of this suit*

Contract validity and enforcement

8. The Defendant takes the position and submits that the Plaintiff cannot legally seek to enforce an invalid contract. It alleges the Plaintiff relied on fraudulent documents from the Kenya National Highway Authority (KenHA) to meet mandatory tender requirements, specifically the minimum annual construction turnover of Kshs. 300,000,000.00. The Defendant states that while the contract was initially voidable, its termination letter dated 31st July 2018, made it void *ab initio* due to the underlying fraud. The

Defendant relies on the maxim "*Ex turpi causa non oritur actio*" meaning no action arises from a dishonorable cause, asserting that a party whose bid was based on fraud from the outset cannot claim any entitlement from that process. It contends that the Plaintiff's actions amounted to fundamental non-compliance with **section 63** of the ***Public Procurement and Asset Disposal Act***.

9. I am in agreement with the Defendant's submission that in **Republic v Kenya Airports Authority Ex-Parte Seo & Sons Limited [2018] KEHC 7637 (KLR)**, the court (Odunga J., as he was then) stated that the Defendant's decision to terminate the Plaintiff's contract on grounds of fraudulent practices was arrived at without hearing the Plaintiff on the said allegations. Further, the court stated that it was "*....not concerned with whether or not the [Defendant] was correct in terms of merit in taking the decision it did. Rather the Court's concern is the process through which the decision was arrived at.*"

10. It is not in dispute that the Defendant, in a letter dated 14th May 2018 called upon the Plaintiff to show cause why the contract could not be terminated on account of the alleged fraud on the KeNHA documents. I am in agreement with the Defendant that from the

evidence on record, there is no proof that the Plaintiff ever responded to the said show cause letter from the Defendant. Based on this silence, the Defendant concluded that the contract be terminated as communicated in its letter of 31st July 2018 and based on the ground of misrepresentation in respect of its qualification to be awarded the tender. The Defendant deemed this to be fraudulent practice and invoked **section 66(3)(b)** of the ***Public Procurement and Asset Disposal Act*** which provides that that if a person is involved in fraudulent practices, “....*the contract shall be voidable.*” The **Black’s Law Dictionary** describes a voidable contract as one which is valid until annulled; or capable of being affirmed or rejected at the option of one of the parties. The **Halsbury’s Laws of England, Volume 9(1)** at para. 607 defines a voidable contract as one which is initially valid but where one or more of the parties has a right of election to avoid or continue and so validate it (Also see **Ayoro v Amboga (Commercial Appeal E026 of 2021) [2023] KEHC 26557 (KLR)]**

11. The Defendant avoided the contract by terminating it first in July 2016, then again in July 2018 after the show cause process.

Whereas the Defendant was within its right to do so, it is not lost to me that the Defendant, through DW 1 admitted that the Plaintiff had done work and that equipment was delivered and was in use at the airport. It also admitted that the initial termination letter was issued after the Plaintiff had already done the work and after the meetings to negotiate payment had failed. In my view, this conduct is inconsistent with a position that the contract was void *ab initio* because if this was truly the position, the Defendant should have stopped all work immediately, rejected the equipment and refused to engage in settlement negotiations. Instead, the Defendant's actions demonstrate that it treated the contract as valid for the purposes of accepting performance and seeking to settle the payment dispute.

12. A party cannot blow hot and cold. If a procuring entity accepts the benefit of a contractor's work, it cannot later avoid payment on grounds of procedural irregularity or fraud unless it can show it acted promptly to reject the work and restore the parties to their original positions. Here, the Defendant did not reject the work, did not return the equipment as it remained in use at the airport and negotiated payment on a "without prejudice" basis which is an

implicit acknowledgment that a payment obligation exists. As the contract was voidable and not void *ab initio*, the Defendant cannot entirely avoid payment for work done and equipment delivered. A party who accepts the benefit of work must pay a reasonable sum for it, even if the contract is avoided and by allowing performance and retaining benefits, the Defendant waived its right to treat the contract as void. It is also my finding that the Defendant's conduct in negotiating payment and using the equipment constitutes a waiver of its right to rely on the defense of fraud to avoid all payment at least for the work done.

13. It is therefore my finding that the contract between the parties was valid and that this validity persisted until the time the Defendant elected to terminate it in 2016 and 2018. However, the Defendant accepted the contract's performance and benefits of the work done by the Plaintiff making it liable to pay for the same subject to proof of the actual work performed and its value.

Topographic survey and the claim of Kshs. 15,200,000.00

14. The Plaintiff states that it completed a detailed topographic survey of approximately 150 square kilometers and established concrete beacons and it relies on topographical drawings and the survey

report produced by PW3 to advance this claim. The Plaintiff notes that the Defendant did not deny these works in their defense and that while the Defendant argued at one point that the drawings were not formally approved, the Plaintiff contends that the contract does not make payment conditional upon such approval.

15. In its evidence, the Plaintiff produced the copy of the contract (PEXhibit 6) where Item 2.01 of the Bills of Quantities indicated that the sum payable to *“provide detailed topography survey of the runway strip and neighborhood area of approximately 150 square kilometers setting out location coordinates of key points and establish temporary beacons made of concrete with reinforced bar at the center”* is Kshs. 15,000,000.00. As stated, PW 3 produced the Topography Survey and Topographical drawings which he stated were generated after the contract was terminated. In a meeting held between the parties on 15th September 2017, the Minutes of the said meeting indicate that the Defendant *“... requested the contractor to consider reducing the cost of the detailed topographical survey by 50% given that the drawings were still in draft format and were never formally approved by KAA”*. In

its response, the Plaintiff insisted on 100% payment and that it was not its fault that the drawings were not approved by the Defendant.

16. Going through the evidence, it is clear that a topographical survey was done and a detailed report was generated by PW 3, demonstrating that the Plaintiff undertook and completed the scope of work described in the contract. The Minutes of the Negotiation Meeting held on 15th September 2017 reveal that the Defendant did not dispute that the survey work was performed, it did not claim the work was defective or useless and requested the Plaintiff to consider reducing the cost by 50% because the drawings were “still in draft format” and “never formally approved by KAA”. This is demonstration that the Defendant negotiated on quantum and not on liability and this negotiation implies acknowledgment of an obligation. The Defendant’s argument that payment should be reduced because the drawings were not formally approved is untenable for reasons correctly pointed out by the Plaintiff that the contract does not make payment for survey work conditional upon formal approval of drawings. The work was performed and payment is due.

17. The contract was terminated by the Defendant on 20th July 2016 whereas the survey work was completed on 9th June 2016 meaning the termination preceded any opportunity for formal approval. The Plaintiff cannot be penalized for the Defendant's own act of termination. What is clear is that the Defendant accepted the survey work and the survey data and control points established on the ground remain available for the Defendant's use even if the project proceeds. As this survey work is a claim for work actually performed and accepted by the Defendant, I find that the Plaintiff is entitled to the Kshs. 15,000,000.00 for the detailed topographical survey as set out in the contract.

Mobilization and Demobilization and the claim for Kshs. 7,000,000.00

18. The Plaintiff claims it mobilized staff and machinery to the site for the project's commissioning by the President in May 2016 and it submits that it produced commissioning photographs, vehicle movement records, and equipment leasing agreements as proof. The Defendant's inspection report from August 2016 showing no camp on site is dismissed by the Plaintiff as misleading, because the Plaintiff had already been ordered to demobilize in July 2016

and did so to mitigate losses and secure equipment in a high-security area. On its part, the Defendant characterized the Plaintiff's mobilization as basic machinery largely to impress upon the President during the project's commissioning.

19. It is not in dispute that the Plaintiff's claim for Kshs. 7,000,000.00 arises from Item 1.07 of the priced Bills of Quantities in the Contract which covered establishment of camp and engineer's office, mobilization of staff, equipment, and resources to the site and subsequent demobilization after termination. The Plaintiff produced photographs showing equipment on site and the project being commissioned by the President and Deputy President on 19th May 2016. This was not disputed by the Defendant. The Plaintiff also produced Equipment Relocation Forms showing equipment being relocated from Nairobi to Wargadud, with signatures of receiving employees. It also produced Equipment Lease and Purchase Agreements which indicate the Plaintiff incurred substantial costs to acquire equipment for the project. The Plaintiff undertook to provide these during the Negotiation Meeting, and they were subsequently submitted and the Defendant negotiated for a 50% payment of the Kshs. 7,000,000.00 which negotiations as

I had stated before, were an admission of its obligation to pay. The Defendant did not deny that mobilization occurred and its only argument was about the sufficiency of evidence.

20. In respect of the August 2016 inspection report by the Defendant showing no camp on site, I find the Plaintiff's explanation to be compelling. The Defendant issued a stop-work letter on 25th July 2016 where it was ordered to stop all works and vacate the site. In compliance, the Plaintiff demobilized to mitigate further losses and to secure equipment in an area posing security challenges considering, Mandera is near the Somalia and Ethiopian borders. Therefore, by the time the Defendant conducted its August 2016 inspection, the Plaintiff had already been ordered off the site and the Defendant cannot order the Plaintiff to vacate and then use the absence of equipment as evidence that mobilization never occurred.

21. The Defendant's characterization that the mobilization was for basic machinery

largely to impress upon the President during the project's commissioning is unsubstantiated and there is no evidence to support this claim. If the equipment was on site for the

commissioning, it was mobilized and the Contract does not distinguish between mobilization for commissioning and mobilization for construction. The item was priced in the Bills of Quantities and the Plaintiff incurred the costs and for these reasons I find that the Plaintiff is entitled to the Kshs. 7,000,000.00 for mobilization and demobilization.

Bush Clearing and Top Soil Stripping and the claim for Kshs. 53,666,000.00

22. The Plaintiff states that it cleared and stripped 48.56 hectares and it applies the contractual bid rate of Kshs. 1,100,000 per hectare. The Plaintiff points out that DW 1 admitted that the Defendant never actually measured the cleared area and only provided a rough estimate of 42 hectares based on a diagram. In her testimony, DW 1 admitted that bush clearing had been done and some soil had been stripped. This is buttressed by the Defendant's own inspection report of August 2016 and DW 1 added that the area which was cleared was as per the diagram in the report which the Plaintiff has calculated to be 42 hectares. DW 1 admitted that these dimensions were an approximation and that the Defendant

did not have any record of the actual bush cleared. When PW 3's report was put to her indicating that he measured an area of 48.56 hectares she stated that the Defendant did not have anything to dispute that this were not the actual dimensions. She was also not aware that the rate per hectare was Kshs. 1,100,000.00 as per the Contract. The Defendant's Negotiating Team also requested a 50% reduction on this item.

23. Based on my analysis of the evidence above and on record, I am inclined to agree with the Plaintiff's submission that it discharged its legal and evidentiary burden showing that it cleared and soil stripped the area as measured by PW 3 which is 48.56 hectares. The contract indicated at Item 3.02 of the priced Bills of Quantities that the fixed rate for site clearance and topsoil stripping was Kshs. 1,100,000.00 per hectare meaning that the Plaintiff is entitled to the claim of Kshs. 53,416,000.00.

Unlawful termination and the claim for Kshs. 53,404,330.71 or any sum at all for loss of profit

24. The Plaintiff has submitted that that the Defendant cannot use "fraudulent documents" as a defense because the court in

Republic v Kenya Airports Authority Ex-Parte Seo & Sons

Limited(supra) already quashed the Defendant's previous decision to terminate on those grounds. It contends that under the **Public Procurement and Asset Disposal Act**, even if fraud occurred, the contract was voidable, not void *ab initio*. Therefore, the contract was valid and enforceable for the work performed until the moment of termination. The Plaintiff notes that the Defendant was informed of the fraud allegations on 23rd June 2016, but proceeded to sign the contract on 27th June 2016, and handed over the site anyway.

25. As I stated before, the Judicial Review court quashed the termination because the Plaintiff was not given an opportunity to be heard. That judgment did not determine whether the Plaintiff actually submitted fraudulent documents, whether the Defendant was entitled to terminate on substantive grounds and whether the Plaintiff was entitled to loss of profits. The subsequent show cause letter of 14th May 2018 gave the Plaintiff an opportunity to respond but the Plaintiff chose silence which in my view cannot be ignored. This demonstrated that the Plaintiff either had no defense to the fraud allegations or chose not to avail itself of the opportunity.

26. Indeed, the Plaintiff is correct that under **section 66(3)(b)** of the ***Public Procurement and Asset Disposal Act***, a contract secured through fraud is voidable, not void *ab initio*. However, as I had alluded to before, even if the contract is voidable, the loss of profit claim is fundamentally different from a claim for work already performed. Work done is compensation for value conferred before avoidance and does not depend on the contract remaining in force. Loss of profit on the other hand is compensation for what the Plaintiff would have earned if the contract had been completed. This remedy is only available to a party that was ready, willing, and able to perform and was wrongfully prevented from doing so.

27. If the Defendant validly avoided the contract even if after a procedural cure, the Plaintiff cannot claim expectation damages for a contract that was lawfully terminated. Whereas the Plaintiff states that the Defendant proceeded to execute the contract and hand over the site even after receiving the reports of fraud, it is possible that the Defendant may have been aware of allegations but may not have had sufficient proof at that time to justify refusing to sign. The Defendant's letter of 20th July 2016 cited a "report on further due diligence" shows that that the investigation continued after

signing. The doctrine of estoppel cannot validate a contract tainted by fraud. Public policy prohibits a party from being estopped from raising fraud simply because it discovered the fraud after signing (see **Kenya Anti-Corruption Commission v Gigiri Court Limited & 3 others [2025] KEELC 7315 (KLR)**)

28. Furthermore, and as pointed out by the Plaintiff, Clause 12(b) the contract expressly allows termination if the Defendant later discovers fraudulent practices. The parties contemplated that fraud could be discovered after execution and therefore, the Plaintiff's estoppel argument is unpersuasive in the context of loss of profits. The said Clause 12(b) of the contract provides that the Defendant may terminate *"If the Contractor in the judgment of the Authority has engaged in corrupt or fraudulent practices in competing for or executing the contract."* This clause gives the Defendant the right to terminate upon a finding of fraud, does not require a criminal conviction and allows the Defendant to make the judgment, subject to review by the court for rationality. The Defendant, after the show cause process, formed the judgment that the Plaintiff had engaged in fraud. The Plaintiff's failure to respond to the show cause letter left that judgment uncontested.

The Plaintiff could not explain the KeNHA letter which was *prima facie* evidence that the Plaintiff had not performed the tenders it claimed. The Plaintiff did not offer any defense and the Defendant was entitled to draw reasonable inferences from the silence. The Plaintiff cannot now claim it was denied a hearing as the opportunity was given and declined.

29. It is for the above reasons that I find that the Plaintiff is not entitled to the claim for loss of profits as the Defendant was justified to terminate the contract based on its own judgment and the Plaintiff's refusal to explain itself. In my view, allowing a contractor who secured a public procurement contract through fraud to claim future profits would be contrary to public policy. Fraud in procurement must be strongly discouraged and denying future profits is a necessary deterrent as taxpayers expect that public contracts are awarded fairly. Rewarding fraudulent bidders with lost profits would undermine confidence in the procurement system.

Reliefs sought in view of the fraud

30. My findings above lead me to conclude that from the Amended Plaintiff, the Plaintiff is only entitled to the sums that have been

proven for work done and accepted by the Defendant and not loss of future profits arising from the Contract. On interest, the Plaintiff prays for interest at 18% commercial rate, compounded from the date of filing suit. The Court of Appeal, in **Alba Petroleum Limited v Total Marketing Kenya Limited [2019] KECA 846 (KLR)** while citing and adopting the Lesotho case of **Boliba Multipurpose Cooperative Society vs. Ramathibeli Joseph Mpoko, CCT 37 of 2007**, held that if no evidence is provided regarding the rate of interest as claimed in the plaint, the claim must fail. Having gone through the Contract, I note that the same does not contain an express interest clause specifying a contractual rate for delayed payments, let alone 18%. However, I find that the Plaintiff is entitled to interest but at court rates as per **section 26(1)** of the **Civil Procedure Act** and under the **Practice Note No.1 of 1982** where the then Chief

Justice Simpson Ag. Cj., issued the following practice direction: -

“The Civil Procedure Act Cap 21 Laws of Kenya Section 26 enables the court to order interest on the principal sum adjudged in a decree both before and after the date of the decree to be paid at such rate as the court deems

reasonable. In the absence of any valid reason for ordering a higher or lower rate of interest, the rate of interest should now be 12%”.

31. For these reasons, I find that the Plaintiff is entitled to be awarded interest at the court rate of 12% from the date of filing suit. Since the Plaintiff's suit is largely successful, I find that it is also entitled to be awarded costs of the suit as well.

Conclusion and Disposition

32. In conclusion, it is my finding that the Plaintiff's suit succeeds to the following extent:

a) Judgment be and is hereby entered for the Plaintiff against the Defendant for the total sum of Kshs. 75,416,000.00

b) The Plaintiff is awarded interest on a) above at the rate of 12% from the date of filing suit until payment in full

c) The Plaintiff is awarded costs of the suit

DATED SIGNED AND DELIVERED virtually at NAIROBI this

8th DAY of MAY 2026

.....
J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. Ms. Gitau holding brief for Mr. Wandabwa for the Plaintiff.
2. Ms. Wachanga holding for Njenga for the Defendant.
3. Amos- Court Assistant